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No. 02-1343

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

ENGINE MANUFACTURERS ASSOCIATION AND
WESTERN STATES PETROLEUM ASSOCIATION,

Petitioners,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

UNOPPOSED BRIEF OF *AMICI CURIAE* ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC., ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. AND TRUCK MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITION FILED BY ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION

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QUESTION PRESENTED

Whether section 209 of the Clean Air Act, 42 U.S.C. § 7543, which prohibits political subdivisions of states from regulating emissions from new motor vehicles, is violated by local regulations dictating the emission level of vehicles that may be purchased by private fleet owners.

RULE 29.6 STATEMENT

Pursuant to S. Ct. Rule 29.6, *amicus* The Alliance of Automobile Manufacturers, Inc. ("the Alliance") is a nonprofit trade association of car and light-truck manufacturers. The Alliance has no parent company, subsidiaries or affiliates that have issued shares to the public.

The Association of International Automobile Manufacturers, Inc. ("AIAM") is a nonprofit trade association of manufacturers, manufacturer-authorized importers and distributors of motor vehicles. AIAM has no parent company, subsidiaries or affiliates that have issued shares to the public.

The Truck Manufacturers Association ("TMA") is a not-for-profit trade association representing major medium- and heavy-duty truck manufacturers. TMA has no parent company, subsidiaries or affiliates that have issued shares to the public.

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INTEREST OF *AMICI*

Amici Alliance of Automobile Manufacturers, Inc., Association of International Automobile Manufacturers Inc., and Truck Manufacturers Association seek leave to file this brief in support of Petitioners and in support of reversing the decision of the district court.[1] *Amici*'s members manufacture or distribute virtually all automobiles and trucks that are sold in the United States. For more than two decades the sale of these new motor vehicles has been subject to federal air pollution control regulations and, within the State of California, to emissions rules adopted and enforced by the California Air Resources Board.

The federal and California vehicle emissions control requirements for new motor vehicles were adopted and enforced under the provisions of Title II of the Clean Air Act ("CAA") which preempts any other emission-related regulation of new vehicles by other authorities. *Amici* and their members have a vital interest in the proper enforcement of the preemption provisions of the CAA applicable to the purchase and sale of new motor vehicles. The federal district court's decision in this case represents a dramatic and inappropriate departure from long-standing interpretations of the CAA. If allowed to stand, the decision will disrupt the statutory framework of the CAA and will substantially adversely affect the *amici*'s members nationwide.

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[1] The parties have consented to the filing of this brief in letters that are on file in the Clerk's office. The preparation of this brief was entirely funded by the Alliance, AIAM and TMA, and the brief was drafted by their counsel. S. Ct. R. 37.6.

SUMMARY OF THE CONTROVERSY

On June 16, 2000, August 18, 2000, and October 20, 2000, California's South Coast Air Quality Management District ("SCAQMD" or "management district") adopted six rules known as the "Fleet Rules." SCAQMD is one of thirty-five local air pollution control agencies of the State of California, established under the California Health and Safety Code §§ 40410, 40412, whose jurisdiction is the Los Angeles metropolitan area and whose powers include the right to adopt rules that are not in conflict with state and federal law. *See* Cal. Health & Safety Code § 40440. The Fleet Rules mandate that certain public and private fleet operators acquire only certain types of vehicles as specified by SCAQMD when replacing their fleet vehicles. The approved vehicles must be certified to the most stringent categories of California emissions standards. Thus, some fleet owners in the SCAQMD are prohibited from purchasing various vehicles manufactured by *amici*'s members that are approved for sale in California. Three of the rules apply only to public fleet operators; three apply to both public and private fleet operators. These regulations seek to have fleet operators purchase only alternative-fuel vehicles, which is defined to mean only those using engines powered by compressed or liquefied natural gas, liquefied petroleum gas (propane), methanol, electricity, or fuel cells.[2] Hybrid-electric and dual-fuel vehicles that use diesel fuel may not be purchased.

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[2] Fleet Rule 1193 applies to public and private solid waste collection fleets with 15 or more vehicles. Fleet Rule 1194 applies to public and private fleet operators with 15 or more vehicles used to transport passengers from commercial airports located in SCAQMD's jurisdiction. Fleet Rule 1186.1 applies to public and private sweeper fleet operators having 15 or more vehicles.

The petitioners for *certiorari* challenged the Fleet Rules in the United States District Court for the Central District of California. The court in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District,* 158 F. Supp. 2d 1107 (C.D. Cal. 2001) ("*EMA*"), upheld the Fleet Rules because they were a restriction on the purchase and lease, not a restriction on the sale of vehicles by fleet operators. *Id.* at 1117. The court held that the Fleet Rules do not set a standard relating to the control of emissions, which would violate the CAA's section 209 preemption provision, because they do not impose any numerical control on new vehicles, but merely regulate which previously certified vehicles may be purchased. *Id.* The case was appealed to the U.S. Court of Appeals for the Ninth Circuit, which summarily affirmed the district court without elaboration. *Engine Mfrs. Ass'n v. South Coast Air Quality Management District*, 309 F.3d 550 (9th Cir. 2002).

SUMMARY OF *AMICI CURIAE*'S ARGUMENT

The effect of these rules is to change more than three decades of mobile source air pollution law. Since 1967 the CAA has limited imposition of new motor vehicle emissions standards to federal standards or, since 1970, to California state standards approved by the U.S. Environmental Protection Agency ("EPA"). *See* Air Quality Act of 1967, Pub. L. No. 90-148, § 208, 81 Stat. 485, now codified at CAA § 209, 42 U.S.C. § 7543.[3] The policy behind these requirements is described in *California ex rel. Air Resources Board v. Department of Navy,* 431 F. Supp. 1271, 1285 (N.D. Cal. 1977), *aff'd*, 624 F.2d 885 (9th Cir. 1980). There the court held that

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[3] *See generally* Arnold W. Reitze, Jr., *Mobile Source Air Pollution Control*, 6 ENVTL. LAW. 309 (2000).

> The reasons given for the enactment of the [CAA's motor vehicle] preemption provision can be summarized as follows: to protect the manufacturer against having to build engines which would comply with a multiplicity of standards; to protect the vehicle owner from having to deal with different standards in each state in which he drives; to avoid the unnecessary duplication of federal standards; to avoid 'unnecessary expense' to the owner; and generally to avoid 'chaos' and 'confusion.'

Id. (internal quotation and citation omitted). The Fleet Rules create the very conditions the preemption policy was designed to prevent.

The position of the *amici curiae* is that the district court's opinion makes the preemption provision of the CAA meaningless. The whole purpose of the preemption language is to keep political subdivisions of states out of the business of regulating emissions from new motor vehicles. The district court's opinion relies on the fictional premise that restrictions on what buyers may purchase do not restrict what manufacturers may produce, a premise that ignores common sense and misreads the law. If the CAA's preemption provision can be evaded by using local regulation banning the purchase of vehicles not meeting "local requirements," there is no effective federal preemption of new motor vehicle emission standards. The door will be opened to a plethora of new vehicle emission regulations by local governments.

THE CLEAN AIR ACT

Under the CAA, new motor vehicles and new motor vehicle engines are subject to a comprehensive program to reduce emissions through technological improvements. *See* CAA §§ 202, 206. Federal law preempts state or local control of new motor vehicles. Section 209(a), 42 U.S.C. § 7543(a), provides "No State or any **political subdivision** thereof shall adopt or attempt to enforce any standard

relating to the control of emissions from new motor vehicles...." (Emphasis added.)

The only exception to the preemption provision described above is found in section 209(b), 42 U.S.C. § 7543(b). This section provides a waiver for the State of California that allows the State to set its own standards as long as the standards are at least as strict as the federal standards and they are approved by the Administrator of EPA as meeting the statutory requirements. After a waiver is granted, compliance with the California standards is considered to be compliance with the federal standards.

California responded to section 209(b) when its California Air Resources Board ("CARB") enacted two motor vehicle emissions regulations. The first regulation applies to passenger cars and medium-duty vehicles (including some diesel-fueled vehicles) and is known as the Low Emissions Vehicle ("LEV") Program. It creates four tiers of increasingly stringent emission standards: (1) transitional low-emission vehicles ("TLEVs"); (2) low-emission vehicles ("LEVs"); (3) ultra-low-emission vehicles ("ULEVs"); and (4) zero-emission vehicles ("ZEVs").[4] The average emissions from the mix of vehicles in the four tiers must meet the overall "fleet average" required for a specified year. Manufacturers that perform better than the fleet average earn credits that may be marketed. Over time, a progressively cleaner mix of vehicles must be sold. CARB's second regulation is its Urban Bus Program. CARB permits bus operators to select one of two compliance paths when purchasing new buses: (1) a diesel path or (2) an alternative fuel path.

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[4] *See* Arnold W. Reitze, Jr., AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT 308 (2001).

The management district's Fleet Rules differ from the state's regulations because the Fleet Rules allow the purchase of only a subset of the LEVs or ULEVs, or the purchase of alternative-fueled vehicles that are designated by the SCAQMD. CARB-certified diesel-fueled engines may not be purchased. SCAQMD's Rule 1192 does not give transit vehicle operators the option to purchase clean diesels, thereby taking away the state's "diesel path" and forcing fleet owners down the "alternative fuel path." In short, many vehicles certified to meet all of California's emission requirements are unable to be purchased by fleet operators within the management district, because SCAQMD's Fleet Rules regulate emissions of fleet vehicles.

This SCAQMD approach flies in the face of the preemption language of section 209(a), as we will discuss in more detail below. It is also inconsistent with the federal policy expressed in section 177 of the CAA, 42 U.S.C. § 7507. Section 177 provides states with a nonattainment area the option to adopt, in their SIP, the California standards for which an EPA waiver has been granted. Any California standard adopted by another state must be adopted in its entirety. It must be identical to the California standard and must provide at least two years, prior to the model year to which it first applies, for the manufacturers to comply. In 1990 Congress amended section 177 to make it clear that no state adopting California standards may "prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle ... that is certified in California as meeting California standards." Thus, while no sovereign state is allowed to impose standards that differ from the applicable federal or California standard, the Ninth Circuit would not so constrain the management district.[5]

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[5]Section 246(a), 42 U.S.C. § 7586(a), requires states with populations of 250,000 or more in a serious or worse ozone nonattainment area (and in (Continued...)

Section 209(d), 42 U.S.C. § 7543(d), provides, "Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." This section was intended to make it clear that state and local governments maintain their traditional control over in-use vehicle operation. As we will explain in detail, the Fleet Rules impose prohibited controls on new motor vehicles and are not the type of regulations that may be imposed by section 209(d).

I. THE DISTRICT COURT'S DECISION CONFLICTS WITH PRIOR DECISIONS OF THE SECOND AND FIRST CIRCUITS; THE FLEET RULES VIOLATE THE PREEMPTION PROVISIONS OF SECTION 209.

Section 209(a), 42 U.S.C. § 7543(a), requires states or their political subdivisions not to adopt or attempt to enforce "any standard relating to the control of emissions from new motor vehicles." Unlike the Ninth Circuit, the First and Second Circuits have held that the use of the word "relating" indicates standards are to be interpreted broadly. The Second Circuit in *American Automobile Manufacturers Ass'n v. Cahill,* 152 F.3d 196 (1998), held that New York's

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certain carbon monoxide nonattainment areas) to establish a clean-fuel vehicle program for fleets. However, section 182(c)(4)(A), 42 U.S.C. § 7511a(c)(4)(A) allows a substitute program to be adopted if EPA approves. California opted out of the clean-fuel vehicle program by substituting an LEV program and an Urban Bus Program approved by EPA at 64 Fed. Reg. 46,849 (Aug. 27, 1999). Because California is not participating in the section 246 program, the SCAQCD Fleet Rules cannot be based on that section. If California was using section 246, the definition found in CAA § 241(2), 42 U.S.C. § 7581(2), allows the use of diesel-fueled vehicles, but the use of such vehicles is prohibited by the SCAQMD's Fleet Rules.

"ZEV sales requirement must be considered a standard 'relating to the control of emissions.'" *Id.* at 200. In *Association of International Automobile Manufacturers, Inc. v. Commissioner*, 208 F.3d 1, 6 (2000), the First Circuit held the Massachusetts ZEV requirements were emissions standards. Moreover, the Second Circuit defined a standard relating to the control of emissions as "regulatory measures intended to lower the level of auto emissions." *Cahill*, 152 F.3d at 200. Emissions standards are not limited to quantitative limits on emissions. In both of these cases, the ZEV regulations were held to be standards within the meaning of section 209(a) because they serve no "purpose other than to effect a general reduction in the level of emissions" from new motor vehicles. 152 F.3d at 200; 208 F.3d at 6.

The SCAQMD Fleet Rules clearly "relate to" the "control of emissions from new motor vehicles." Indeed, control of emissions is the entire purpose and effect of the SCAQMD Fleet Rules. *EMA*, 158 F. Supp. 2d at 1114 (noting that Fleet Rules are "an effort to reduce public exposure to motor vehicle pollution"). There can be no doubt that the Fleet Rules are in "connection with" control of emissions, or that their "purpose and effect ... is to effect a quantitative reduction in emissions." *Commissioner*, 208 F.3d at 7. Moreover, SCAQMD can hardly dispute that its Fleet Rules make "reference to" the control of emissions given that they incorporate a subset of vehicles approved by the CARB for purposes of emissions control. The fact that the management district's Rules expressly limit the purchase of vehicles to those that are certified to a subset of the applicable California numerical emission limits, while prohibiting the purchase of vehicles that comply with other valid California and federal emission limits, necessarily means that the Rules are "standards" relating to control of vehicle emissions.

In *EMA*, the district court reasoned that while the state has the sole authority to establish emission standards that apply to the sales of a class of vehicles, a local government may nevertheless prohibit their purchase. This interpretation makes a mockery of section 209's preemption language. The district court's analysis would allow any sales requirement concerning new motor vehicles that is subject to federal preemption to be avoided if the local regulation was drafted to be a ban on the purchase of such vehicles. The Second Circuit's decision in *Cahill* and the First Circuit's decision in *Commissioner* are purportedly distinguished because they involved restrictions on the *sale* of vehicles as opposed to so-called purchase prohibitions. This distinction is semantic nonsense. Every new vehicle transaction involves the purchase of the vehicle by the purchaser and the sale of the vehicle by the seller. Thus, the sale and purchase of a new motor vehicle are two sides of the same coin. One cannot occur without the other, and government cannot regulate one without regulating the other. When Congress preempts emissions-related restrictions on the sale of new motor vehicles, it necessarily preempts emissions-related restrictions on the purchase of new motor vehicles.[6]

Such a distinction leads to absurd results. For example, without purporting to impose any restrictions directly on manufacturers, one local jurisdiction could require twenty percent of its population to purchase liquefied natural gas powered engines and another local jurisdiction could require

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[6] The legislative history of section 209 indicates that Congress intended preemption to protect both vehicle manufacturers and purchasers from confusion and unnecessary burdens. *See* S. Rep. No. 89-192, at 6 (1965) (state and local regulation of vehicle emissions would "result in chaos insofar as manufacturers, dealers, and users are concerned."); *see also Callifornia ex rel. Air Resources Board v. Department of Navy*, 431 F. Supp. 1271, 1285 (N.D. Cal. 1977), *aff'd*, 624 F.2d 885 (9th Cir. 1980) (noting same).

fifty percent of its population to purchase methanol powered engines and ban the purchase of liquefied natural gas engines. This process could play itself out time and again across the country (or among the other thirty-four management districts in California), with each local government establishing a different set of purchase requirements unique to its particular area. It is this possibility that Congress explicitly sought to prevent—"an anarchic patchwork of federal and state regulatory programs...." *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979), *cert. denied sub nom. General Motors Corp. v. Costle*, 446 U.S. 952 (1980).

Congress did not limit preemption to restrictions on vehicle "sales." The preemptive reach of section 209(a) covers any "standard" for "new vehicles." Any distinction between sale restrictions and purchase restrictions is irrelevant provided that a purchase restriction is a "standard" relating to control of "new" motor vehicle emissions. Congress intended to preempt comprehensively state and local regulation of emissions from new motor vehicles, while allowing States to play a role in regulating "in-use" emissions *after* the vehicles are in the possession of consumers. *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y.), *aff'd*, 468 F.2d 624 (2d Cir. 1972) (section 209(a) preemption does not preclude States or their political subdivisions from regulating "the use or movement of motor vehicles after they have reached their ultimate purchasers"). The explicit statutory distinction between the regulatory power of state and local governments over "new" and "in-use" vehicles was intended to "postpon[e] state regulation so that the burden of compliance will not fall on the manufacturer." *Engine Mfrs. Ass'n v.*

EPA, 88 F.3d 1075, 1086 (D.C. Cir. 1996).[7] Because the SCAQMD rules apply to "new" vehicles, they are expressly preempted by section 209(a).[8]

In addition to preempting emission standards, section 209(a) provides no state shall require any other approval relating to the control of emissions from new motor vehicles as a condition precedent to the initial sale, titling or registration of a new motor vehicle. One cannot register a vehicle unless there first has been a sale to the consumer. Such a sale would by its very nature require a purchase. But, if a purchase is made of a vehicle with emissions that do not meet SCAQMD's Fleet Rule, the purchaser—prior to its first registration—may face serious penalties. Section 42400 of the California Health and Safety Code makes any violation of a District Rule a misdemeanor which subjects the violator to a penalty up to $1,000 per day and imprisonment up to six months. If the violation is deemed "knowing," the penalty can be up to $40,000 per day and up to one year in prison. *See* Cal. Health & Safety Code § 42400.2. If the violation is "willful and intentional," the penalty can go to $75,000 per day and result in up to one year in prison. *See id.* § 42400.3. Injunctive relief and administrative penalties also may be used. *See id.* §§ 42400.7 and 42410. Thus, SCAQMD's Fleet Rules impose a clear "condition precedent" to the sale of a motor vehicle and carry substantial penalties for

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[7] The Act defines a "new" motor vehicle as one whose "title has never been transferred to the ultimate purchaser," such as a retail customer or a leasing company. CAA § 216(3), 42 U.S.C. § 7550(3).

[8] Even if the SCAQMD Fleet Rules were not preempted *expressly* by section 209(a), they would still be implicitly preempted, under principles of conflict preemption, because they "prevent or frustrate the accomplishment of a federal objective," *Geier v. Am. Honda Co.*, 529 U.S. 861, 873-74 (2000). For SCAQMD to go outside of the federal approval process frustrates the object of Clean Air Act preemption.

noncompliance, clearly violating the second sentence of section 209(a).

II. THE FLEET RULES ARE NOT VALID REQUIREMENTS PURSUANT TO SECTION 209(d).

By way of clarifying the preemption provision in section 209(a), section 209(d) makes it clear that states or their political subdivisions retain the right to "otherwise" regulate registered or licensed motor vehicles. The discussion above shows that the Fleet Rules are emission standards and are requirements applicable to new motor vehicles prior to their initial registration. The Fleet Rules are not the kind of rules allowed by section 209(d) to be imposed by political subdivisions of the state.

With respect to vehicle emissions, local governments may have a legitimate role in helping to *enforce* emissions requirements imposed at the state level on in-use vehicles. The most important example of this is the inspection and maintenance program (I/M) required in ozone nonattainment areas by section § 182(b)(4), 42 U.S.C. § 7511a(b)(4).[9] This program has characteristics common to all programs used by states to control emissions from in-use vehicles. It applies to all covered vehicles regardless of the emissions measured as part of the engines original certification, and it applies only

[9] A more stringent enhanced I/M program is required in serious or worse ozone nonattainment areas by section 182(c)(1), 42 U.S.C. § 7511a(c)(1) and in moderate or worse carbon monoxide nonattainment areas with a design value greater than 12.7 parts per million by section 187(a)(6). *See generally* Arnold W. Reitze, Jr., *Federalism and the Inspection and Maintenance Program Under the Clean Air Act*, 28 PAC. L.J. 1461 (1996).

to vehicles that have been purchased and registered to consumers.[10]

An evaluation of the current in-use motor vehicle programs reinforces the conclusion that the Fleet Rules are emission standards that may not be imposed by local governments. Indeed, none of the in-use motor vehicle control programs regulate the purchase or sale of any classes of vehicles based on their potential emissions. A local government prohibition on purchasing certified vehicles is wholly inconsistent with existing in-use programs. SCAQMD's overt attempt to impose emissions-related restrictions on fleet owners prior to vehicle registration violates section 209's preemption provision and the explicit Congressional policy behind it.

[10] Similar coverage of registered vehicles is found in the gasoline vapor recovery requirements of section 182(b)(3), 42 U.S.C. § 7511a(b)(3), transportation controls imposed by section 182(c)(5), 42 U.S.C. § 7511a(c)(5) and the vehicle mile reduction requirements of section 182(d)(1), 42 U.S.C. § 7511a(d)(1). The conformity provisions of section 176(c), 42 U.S.C. § 7506, require transportation plans and programs to be consistent with a transportation emissions budget for the aggregate emissions from motor vehicles in the area covered by the state implementation plan. *See generally* Arnold W. Reitze, Jr., *Transportation-Related Pollution and the Clean Air Act's Conformity Requirements*, 13 NAT. RESOURCES & ENV'T. 406 (1998).

CONCLUSION

Prohibiting purchases of vehicles whose emissions exceed a certain level is no different in its purpose and effect than prohibiting sales of vehicles whose emissions exceed that same level. The management district's rules prohibiting private parties from purchasing vehicles that can otherwise be lawfully sold in California are preempted by the CAA. The decision below should therefore be reversed.

Respectfully submitted,

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